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The Demise of the Public Figure in Defamation Cases and the Ascent of a Responsible Press - Time, Inc. v. Firestone

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THE DEMISE OF THE PUBLIC FIGURE IN DEFAMATION CASES AND THE ASCENT OF A RESPONSIBLE PRESS—*TIME, INC. V. FIRESTONE*

Defamation actions brought against publishers present a conflict between the individual's interest in redressing an injury to his reputation and the press' assertion of First Amendment protection. At common law, a qualified press privilege served to accommodate the two interests. The press was granted immunity for erroneous publications made in the course of reporting on matters of public concern.[1] This conflict was raised to constitutional proportions in *New York Times Co. v. Sullivan* which held that press liability for a misstatement of fact about a public official was constitutionally permissible only if the press acted with actual malice.[2] Subsequently, the Supreme Court expanded this constitutional privilege to include press reports of public figures.[3] *Time, Inc. v. Firestone*[4] represents the Court's latest attempt to balance freedom of the press with the individual's right to protect his reputation. In *Firestone,* the Court held that the wife of a prominent industrialist, who held press conferences about a pending divorce, was not a public figure and did not need to show that the news item about her divorce was published with actual malice in order to recover.[5] The Court's application of the public/private figure distinction indicates that the present Court is taking a step in the right direction by allowing the states to impose greater liability upon the press in defamation cases.[6]

The purpose of this Note is to compare *Firestone* with prior decisions in order to demonstrate that the public/private figure distinction has

1. *See* Flues v. New Nonpareil Co., 155 Ia. 290, 135 N.W. 1083 (1912); Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S.W. 257 (1906). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §118, at 819 (4th ed. 1971).

2. 376 U.S. 254, 279-80, 283 (1964).

3. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

4. 424 U.S. 448 (1976).

5. *Id.* at 455, 457.

6. The *Firestone* decision has been criticized extensively by commentators who equate the demand for a responsible press with the erosion of First Amendment freedoms. *See, e.g.*, Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power,* 54 TEXAS L. REV. 271 (1976); McKenna, *Time, Inc. v. Firestone: More Than A New Public Figure Standard,* 20 ST. LOUIS U. L.J. 625 (1976); McKey, *Defamation Law After Time, Inc. v. Firestone,* 13 IDAHO L. REV. 53 (1976); Comment, *Time, Inc. v. Firestone: Sowing the Seeds of Gertz,* 43 BROOKLYN L. REV. 123 (1976); Comment, *Time, Inc. v. Firestone: The Supreme Court's Restrictive New Libel Ruling,* 14 SAN DIEGO L. REV. 435 (1977); Note, *The Firestone Case: A Judicial Exercise in Press Censorship,* 25 EMORY L.J. 705 (1976).

been applied inconsistently by the Court and is based upon faulty premises. This Note also will suggest that the rationale for the actual malice standard only requires that this standard be applied when public officials are involved. A single standard for all other plaintiffs would be a more workable approach.

ANALYSIS OF THE COURT'S DECISION

Mary Alice Firestone filed suit in a Florida court for separate maintenance from her husband, a wealthy industrialist, and her husband counterclaimed for divorce on the grounds of extreme cruelty and adultery. The trial court granted a divorce and awarded Mary Firestone alimony. Without specifying on which of the two grounds the counterclaim was based, the court concluded that "neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida. . . ."[7] On the basis of newspaper and wire service reports plus information furnished from a bureau chief and a free lance reporter, *Time* published a magazine item reporting that the husband was granted a divorce on the grounds of "extreme cruelty and adultery."[8] Prior to publication, no one employed by *Time* had actually read the court decree.[9] Under Florida law at that time, "a wife found guilty of adultery could not be awarded alimony."[10] After *Time* refused to print a retraction,[11] Mary Firestone brought a libel action in state court. The jury verdict in her favor ultimately was affirmed by the Florida Supreme Court.[12]

Justice Rehnquist delivered the Court's opinion in which Chief Justice Burger and Justices Stewart, Blackmun, and Powell joined.[13] In

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7. *See* 424 U.S. at 451.

8. *Id.* at 451-52. The *Time* article read:

> DIVORCED. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach school teacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."

Id. at 452.

9. *Id.* at 459 n.5.

10. *Id.* at 462. *See* FLA. STAT. ANN. §61.08 (1969) (amended 1976).

11. Under Florida law, a prerequisite for bringing a libel action is a demand for a retraction. 424 U.S. at 452 n.1, *citing* FLA. STAT. ANN. §§770.01-.02 (1963).

12. Firestone v. Time, Inc., 305 So.2d 172, 178 (Fla. Sup. Ct. 1974).

13. Justice Powell, in his concurring opinion, with which Justice Stewart joined, stressed that the evidence suggested that *Time* had "exercised considerable care in checking the accuracy of the story prior to its publication" and may not have been negligent. 424 U.S. at 466 (Powell, J., concurring). Justices Brennan, White, and Marshall dissented.

rendering the decision, the Court rejected petitioner's arguments that the news item constituted a report of judicial proceedings and automatically required application of the actual malice privilege.[14] After refusing to recognize a blanket privilege for reports of judicial proceedings,[15] the Court held that Mary Firestone need not prove that *Time* published the libelous matter with actual malice in order to recover, since she was not a public figure.[16] All that was necessary to impose liability on the press was a showing that *Time* was guilty of some degree of fault,[17] with the actual degree of fault to be determined by the state.[18] The case was remanded to the Florida courts to determine whether the news item was "the product of some fault" on the publisher's part.[19]

By narrowly construing the public figure classification, the *Firestone* opinion continues a recent trend toward allowing the states to impose greater liability on the press. Prior to 1974, press liability was conditioned upon a showing of actual malice if the article was about a public official, a public figure, or a matter of public interest.[20] These three

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Both Brennan and Marshall felt that the actual malice standard should be applied, although they disagreed as to the reason why. Brennan believed the item was a report of a judicial proceeding, *id.* at 471 (Brennan, J., dissenting), while Marshall would have categorized Mary Firestone as a public figure. *Id.* at 484 (Marshall, J., dissenting). White addressed the issue of negligence and would have affirmed the court below because he felt there was ample evidence to support the jury verdict that the item was false and defamatory. *Id.* at 481-82. (White, J., dissenting).

14. 424 U.S. at 455. Petitioner also had argued that the actual malice standard was required because Mary Firestone was a public figure, well-known as a prominent member of the '400' of Palm Beach society, and a figure in a public controversy by virtue of the fact that her divorce was a *cause celebre.* Brief for Petitioner at 31-33, Time, Inc. v. Firestone, 424 U.S. 448 (1976).

15. 424 U.S. at 456.

16. *Id.* at 455, 457.

17. *Id.* at 461.

18. *Id.* at 461-64. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), the Court held that the press cannot be held strictly liable for defamatory statements, but the states may define for themselves the appropriate standard of liability to be imposed on a publisher.

19. 424 U.S. at 463-64.

20. Actual malice was defined in New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964), as knowledge that the defamatory statement was false or published with reckless disregard of whether it was false or not. In *New York Times* the actual malice test was applied to an article concerning a public official. Three years later the test was extended to articles concerning public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). *See also id.* at 164 (Warren, C.J., concurring). The outer limits of the actual malice standard were reached in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971), where the rule was extended to matters concerning the public interest. The *Rosenbloom* "public interest" theory was subsequently rejected by the Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). In *Gertz*, the Court held that "extension of the *New York*

categories of plaintiffs were required to show actual malice with convincing clarity in order to recover.[21] Thus, the press was granted substantial freedom in its reporting, with liability for defamation imposed in very limited circumstances.[22]

The Court's position shifted in 1974 with *Gertz v. Robert Welch, Inc.*, which held that the press cannot claim the protection of the actual malice standard when writing about a private individual who has been defamed concerning a matter of public interest.[23] In *Gertz*, the Court clarified the type of conduct that would subject the press to liability.[24] A public figure must prove a defamatory item was printed with actual malice to recover,[25] while a private figure can recover upon a lesser

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Times test proposed by the *Rosenbloom* plurality would abridge the legitimate state interest [in providing a remedy for defamation] to a degree that we find unacceptable." *Id.* at 346. *See* Note, *Time, Inc. v. Firestone: Is Rosenbloom Really Dead?*, 31 U. MIAMI L. REV. 216 (1976).

21. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43, 346 (1974), *citing* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public official); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (public figure); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (matter of public interest).

22. Few plaintiffs have been able to recover under the actual malice standard. The Supreme Court, as well as lower courts, has consistently held in favor of the press. Because courts have broadly construed the terms public official and public figure, individuals have had little remedy against press defamation under the actual malice standard. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971) (charge of criminal conduct against an official or candidate for public office always invokes the *New York Times* actual malice standard); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (government employee having substantial responsibility for conducting and supervising government affairs is a public official); Arber v. Stahlin, 10 Mich.App. 181, 186, 159 N.W.2d 154, 157 (1968), *rev'd*, 382 Mich. 300, 170 N.W.2d 45 (1969), *cert. denied*, 397 U.S. 924 (1970) (members of political organizations defamed by the press were considered public figures because they were identified with persons of political prominence); Rose v. Koch, 278 Minn. 235, 260, 154 N.W.2d 409, 426 (1967) (university professor elected to the legislature was a public figure); Tilton v. Cowles Publishing Co., 76 Wash.2d 707, 717, 459 P.2d 8, 14 (1969), *cert. denied*, 399 U.S. 927 (1970) (policemen and firemen who voluntarily ran for positions on the public safety council were public figures).

But see Herbert v. Lando, 74 Civ. 434-CSH (S.D.N.Y. Jan. 4, 1977). In *Herbert*, a United States District Court significantly expanded the boundaries of pre-trial discovery in a public figure defamation suit. The court allowed discovery into the formerly sacrosanct area of a newsman's thoughts and motives in putting together a story. Noting the difficulty a public figure plaintiff has in proving actual malice, the court said that expanded pre-trial discovery would be the best way of surmounting this difficult barrier.

23. 418 U.S. 323, 339-48 (1974).

24. *Id.* at 342-43. *Gertz* was the first case to deal specifically with the degree of protection for the press when private figures are defamed, although *New York Times* introduced the actual malice standard for public officials. *See* note 65 *infra*.

25. Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-64 (1967)(Warren, C.J., concurring).

showing of fault to be determined by the state.[26]

The *Firestone* Court did not question the validity of the public/private figure distinction. The Court applied the same criteria used in previous Supreme Court cases to determine who is a public figure.[27] First, if a person occupies a position of "persuasive power and influence," she is a public figure with respect to any news item published about her.[28] Second, if she thrusts herself to the forefront of a specific public controversy, she is a public figure, but only with respect to that controversy.[29] Mary Firestone was not, the Court found, a public figure under the first test because she "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society . . . ."[30] Nor did her actions make her a public figure under the second test because she did not "thrust herself to the forefront of any particular public controversy . . . ."[31] The Court emphasized that Mary Firestone did not choose to be a public figure but was compelled to "[r]esort to the judicial process" in order to obtain a divorce.[32]

In two prior defamation cases, the Supreme Court has had to determine whether the individuals involved were public or private figures. The Court in both *Curtis Publishing Co. v. Butts*[33] and *Gertz v. Robert Welch, Inc.*[34] used the same criteria for making this determination, but the application of the public/private figure standard resulted in a different conclusion in each case. In *Curtis*, the Court held that a former University of Georgia football coach was a public figure solely by virtue of his position in the sports world.[35] In a case consolidated with *Curtis*, the Court found that a politically active citizen was a public figure when he purposefully thrust himself into the "vortex" of a civil rights controversy concerning the enrollment of a black student.[36]

In *Gertz*, the Court found that a well-known Chicago lawyer was not a public figure for all purposes and in all contexts by virtue of his position, in spite of the fact that he had considerable stature as a lawyer, author, lecturer, and participant in community and professional af-

26. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).
27. 424 U.S. at 453, *quoting* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).
28. *Id.* at 453.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 454, *quoting* Boddie v. Connecticut, 401 U.S. 371, 376-77 (1971).
33. 388 U.S. 130, 155 (1967).
34. 418 U.S. 323, 351-52 (1974).
35. Curtis Publishing Co. v. Butts, 388 U.S. 130, 135-36, 155-58 (1967).
36. *Id.* at 140, 155.

fairs.[37] Nor was he, the Court concluded, a public figure because of his voluntary role as legal counsel in a civil suit resulting from a murder committed by a Chicago policeman, for this role was not the one which invited press coverage.[38] Rather, the statements written about him related to the criminal trial of the policeman, a matter in which Gertz was not directly involved.[39] Furthermore, the defamation related to Gertz's personal political beliefs rather than to his activities as legal counsel for the victim's family.[40]

A comparison of *Firestone* with *Curtis* and *Gertz* demonstrates an inconsistency in the Court's application of the public figure test. The factual situations in *Firestone* and *Curtis* were so similar that the Court should have reached the same determination on the public figure issue. However, the plaintiffs in *Curtis* were classified as public figures, while Firestone was not. It seems illogical to conclude that the first plaintiff in *Curtis,* Wally Butts, was more prominent than Mary Firestone. His notoriety arose from his activities in the sports world,[41] while hers arose from her position in the society world.[42] The plaintiff in the case consolidated with *Curtis*, Edwin Walker, was a leader in a civil rights demonstration and was considered a public figure because his activities were the focus of press coverage.[43] Mary Firestone, on the other hand, initiated press coverage about her divorce. In this respect, she was more assertive in inviting publicity. In concluding that she was not a public figure, the Court apparently relied on the fact that, unlike Walker's civil rights demonstration, her divorce was not a public controversy.[44]

Although the Court came to the same conclusion, that the plaintiffs in both *Firestone* and *Gertz* were private figures, the factual situations in these two cases appear to require different results. In *Gertz,* the lawyer did not voluntarily invite publicity when he agreed to represent a client.[45] Similarly, Mary Firestone did not voluntarily resort to the judicial process but was compelled to do so to obtain a divorce.[46] Unlike Gertz, however, Firestone called press conferences to publicize her situa-

37. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974).

38. *Id.* at 325-26, 352.

39. *Id.* at 352. The news item emphasized an allegedly Communist conspiracy of which Gertz was said to be a member and accused Gertz of having a criminal record and being a Communist fronter. *Id.* at 326.

40. *Id.* at 326.

41. Curtis Publishing Co. v. Butts, 388 U.S. 130, 135-36 (1967).

42. Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).

43. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

44. Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976).

45. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).

46. 424 U.S. 448, 454 (1976).

tion. The *Firestone* Court found that the plaintiff's voluntary act of calling press conferences insignificant.[47] But on this ground, it would seem that Firestone was more of a public figure than Gertz. In *Gertz*, the defamation concerned the plaintiff's political beliefs, not his activities as a prominent lawyer.[48] Firestone was defamed about her divorce, the very controversy which resulted in publicity. Thus, while the contours of the public/private figure test are well-established and seemingly clear, they have not been applied uniformly or consistently to various fact situations. The *Firestone* decision exemplifies this problem. At present, neither the press nor the individual is put on notice as to how the criteria will be applied in determining who is a public figure.[49]

The *Firestone* opinion concerned itself with an analysis, under the specific factual situation of the case, of why Mary Firestone is a private figure.[50] It indicates that the Court will continue to apply the public/private figure classification in determining standards of press liability, but in the future the public figure category will be construed more narrowly. However, the decision fails to reexamine the theoretical foundation for the two-tier standard or to question whether such a standard is compatible with the First Amendment.[51]

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47. *Id.* at 454-55 n.3.

48. Gertz v. Robert Welch, Inc., 418 U.S. 323, 325-26.

49. As Justice Black warned, no one can know what is constitutionally libelous after the *Curtis* decision. According to Black, the problem is that the Court is utilizing "various experimental expedients" in libel cases which hinge on how offensive the particular libel judgment may be to the Court. Curtis Publishing Co. v. Butts, 388 U.S. 130, 171-72 (1967) (Black, J., dissenting).

50. 424 U.S. at 452-57.

51. Some legal scholars already have questioned the intellectual validity of the two-level theory in other areas of First Amendment freedoms. The late University of Chicago Professor Harry Kalven, Jr. questioned the validity of the two-level theory of free speech in obscenity cases. He criticized the Court's reliance on the classification system because it did not provide a consistent framework for what speech will be protected. *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10, 15.

Professor Kenneth L. Karst of the University of California, building on Kalven's analysis, believes that a two-level theory is inconsistent with the principle of equality of expression and violates the presumption against regulation of the content of speech. Karst argues that the equality principle is the heart of the First Amendment and demands that all speakers and points of view are entitled to the same degree of protection. He maintains that recognition of the equality principle by the Court will compel a reevaluation of several of their previous doctrines to eliminate inconsistent decisions. Karst's analysis was in the framework of a discussion of the government's power to restrict free expression, but his analysis also would seem appropriate to an evaluation of the government's power to restrict a free press. *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 29-35 (1975). The two-tier standard of protection in the area of defamation law has not been analyzed from this point of view, but under such an analysis, the standard may prove to be constitutionally untenable.

THE BASIS FOR THE PUBLIC/PRIVATE FIGURE DISTINCTION

The public/private figure categorization[52] is based on the theory that public figures have access to a forum from which to rebut false statements made about them, but private individuals do not.[53] Public figures also are granted less protection because they voluntarily assume the risk of being defamed when they choose to enter the public sphere.[54] Therefore, a public figure can recover from the press for defamatory statements only upon a showing that such statements were made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[55] On the other hand, because private individuals have no means to rebut false statements made about them, they can recover upon a showing of some fault; actual malice need not be proven.[56]

This distinction is somewhat fallacious. Absent "right to reply"[57] or retraction statutes,[58] the content of published material is determined by the newspaper, not the public figure. Unless the public figure controls his own newspaper or is wealthy enough to buy newspaper space, his access to a forum for rebuttal may be as limited as the private individual's. The press may provide more coverage of public figures, but this does not assure in any way that the individual's position will be stated accurately or given equal publicity.[59]

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52. For a comprehensive analysis of the two-tier protection standard, see Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 220-30 (1976).

53. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

54. *Id.* at 344-45.

55. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

56. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-48 (1974).

57. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247, 258 (1974), the Court held that a statute granting any candidate an enforceable right to reply to criticism the newspaper had printed about him was violative of the First Amendment. The decision indicates that any statutory provision dictating what the press must print is unconstitutional. For a discussion of the access issue, *see, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1, 8-9 (1973).

58. The Massachusetts retraction statute is typical of retraction statutes currently in force in a number of states. It provides for mitigation of damages upon a printed retraction of the allegedly libelous publication. Offer by the publisher to print a "reasonable retraction" is evidence that the publication was printed in good faith and without actual malice. MASS. ANN. LAWS ch. 231, §93 (1969).

59. The print media is big business today, and the power and influence of the press controls the flow of information and monopolizes the marketplace of ideas. Of necessity, the press is selective about the ideas it chooses to promulgate. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249-50. *See also* Comment, *New Challenges to Newspaper Freedom of the Press—The Struggle for Right of Access and Attacks on Cross-Media Ownership*, 24 DEPAUL L. REV. 165, 170 (1974).

In contrast, public officials have significantly greater access to the communications media. For this reason, the Court justified applying the actual malice standard to public officials.[60] This standard is also founded on our country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[61] An uncensored press has been afforded a special place in the hierarchy of constitutional guarantees because the free flow of ideas is essential to the health of a self-governing society[62] and to a citizen's essential participation in that democracy.[63] The actual malice standard was developed for public officials so that citizens would be free to criticize public employees in their official capacities.[64] Neither of these reasons, access to a forum for rebuttal or the need for freedom to criticize officials, applies to individuals who are not public officials.[65] In addition, states have a substantial interest in protecting citizens from unjustifiable damages to their reputations.[66] The absence of the two rationales for applying the actual malice standard plus the countervailing state interest indicates that the actual malice standard need not be imposed unless public officials are involved.

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60. *Id.* at 304-05.

61. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

62. Curtis Publishing Co. v. Butts, 388 U.S. 130, 149 (1967).

63. In Cox Broadcasting Corp. v. Cohn, the Court stated:

> Great responsibility is . . . placed upon the news media to report fully and accurately the proceedings of government . . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

420 U.S. 469, 491-92 (1975).

64. New York Times Co. v. Sullivan, 376 U.S. 254, 304 (1964) (Goldberg, J., concurring).

65. The Court first extended the actual malice requirement to plaintiffs who are public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). But the *Curtis* Court clearly explained that the particular considerations which demanded the actual malice standard in *New York Times* were not involved in a case dealing with a public figure instead of a public official. *Id.* at 154. The Court acknowledged that *New York Times* was close to seditious libel and concerned an area of the law which relates to the free debate of government polices. *Id.*

In *Curtis*, the Court relied on only one of the rationales expressed in *New York Times*, concluding that both of the plaintiffs "commanded sufficient continuing public interest" and access to the media to justify requiring a higher standard of proof. *Id.* at 155. Yet, the plurality opinion did not require the actual malice standard, only that the plaintiff show "*highly unreasonable conduct* constituting an extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers." *Id.* at 155 (emphasis added). It was Chief Justice Warren's separate opinion which explicitly rejected a differentiation between public officials and public figures. *Id.* at 163-64 (Warren, C.J., concurring).

66. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

A Suggested Approach

The public/private figure distinction has been applied inconsistently by the Court, and even the theoretical basis for the categorization is questionable. The rationale for the actual malice standard applies only when public officials are involved. A standard which does not require classification of plaintiffs would be more consistent than the current two-tier standard. The common law approach of evaluating press liability is more rational. One standard of fault, as determined by each state, would permit recovery regardless of the status of the individual unless he is a public official. Whether the plaintiff is a public official can be determined readily. One standard of liability for all other plaintiffs would eliminate having to determine whether the plaintiff should be classified as a public or private figure.

Adoption of a standard of negligence for all individuals other than public officials would put the press on notice as to what quantum of fault would subject it to liability in defamation actions. A standard of negligence for the press could be developed quickly and readily if the Court allows the states to embrace this standard.[67] At the same time, the press would be immunized if it acted in a responsible and prudent manner.

The negligence standard has been shown to be constitutionally sufficient with respect to a private figure.[68] There is no reason to believe that the standard of negligence would not be adequate with respect to public figures[69] or that it would not provide a sufficiently acceptable margin of error to give freedom of expression the "breathing space" it "need[s] . . . to survive . . . ."[70] The press today can utilize its financial and intellectual resources to develop methods of checking the accuracy of

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67. The Supreme Court already has begun to define the standards of negligence for the press. *See* Robertson, *supra* note 52, at 251, *citing* New York Times Co. v. Sullivan, 376 U.S. 254, 287-88 (1964) ("publishing an editorial advertisement submitted by prominent, credible, and responsible people without checking its accuracy against news stories in the paper's own files was 'at most' negligence"); and Time, Inc. v. Hill, 385 U.S. 374, 391 (1967) (since "checking with the author would have revealed a high degree of fictionalization, the facts 'would support either a jury finding of innocence or mere negligent misstatement' ").

Common law cases are also helpful in defining a negligence standard for the press. *See, e.g.*, Turner v. Hearst, 115 Cal. 394, 47 P. 129 (1896) (reliance on an unverified report can be judged to be negligence); Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888) (reporters must use care to reasonably prevent mistake).

68. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

69. The plurality in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967), utilized a "reasonable publisher" standard. *See* note 65 *supra*.

70. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

news items in order to shield it from a charge of negligence. At the same time, by limiting damages to actual injury, the press can be protected from outrageously large damage judgments.[71] The principle of limiting damages to actual injury, established in *Gertz*[72] and adhered to in *Firestone*,[73] will stem any threat of a flood of lawsuits. If the courts prohibit presumed and punitive damages and require a high standard of proof of actual injury, the number of lawsuits will be minimized. The press also can be given opportunities to mitigate liability by making use of retraction statutes whenever inadvertent error occurs. The press today is not "easily intimidated,"[74] and requiring it to pay for occasional negligence will not lead to self-censorship[75] but may lead to self-discipline.

CONCLUSION

The problem is not whether regulation of the press is permissible but what standard of liability will best accommodate the conflicting interests of the press and the individual. Any judicial method of restricting expression of the print media must be approached cautiously. This does not mean that legal intervention is impossible or undesirable. The *Firestone* decision is a step in the right direction in striking an acceptable balance between two important interests. The print media cannot expect to stand behind the shield of First Amendment protection for libelous statements without demonstrating that it gathered and reported the news in a responsible manner. It remains for the Court to decide whether it will broaden the *Firestone* holding and allow the states to apply their own standards of liability in defamation actions. If so, the Court at last may begin to solve a problem it has been wrestling with for the past fifteen years. By allowing states to adopt one standard for all persons other than public officials, the interests of individuals wishing to protect their reputations and the interests of the press in maintaining autonomy and integrity can be accommodated.

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71. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

72. The *Gertz* Court did not define "actual injury," but made it clear that the goal of this limitation was to eliminate uncontrolled jury verdicts which award "gratuitous awards of money damages far in excess of any actual injury" and to insure that "state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved." *Id.* at 349-50.

73. 424 U.S. 448, 461 (1976).

74. Gertz v. Robert Welch, Inc., 418 U.S. 323, 391 (White, J., dissenting).

75. *Id.*